

The Honorable Jay V. White

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

GREGORY McNEILL and WILMA ARMER,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

v.

OPENMARKET, INC., a Michigan  
corporation; SPRINT SPECTRUM, L.P., a  
Delaware limited partnership; and NEXTEL  
WEST COFRPORATION, a Delaware  
corporation,

Defendants.

SPRINT SPECTRUM, a Delaware limited  
partnership; and NEXTEL WEST CORP., a  
Delaware corporation,

Cross-Claimants,

v.

OPENMARKET INC., a Michigan corporation,

Cross-Defendant.

NO. 08-01731 RSL

NOTICE OF APPEAL TO THE  
UNITED STATES COURT OF  
APPEALS TO THE NINTH CIRCUIT

NOTICE OF APPEAL TO THE UNITED STATES COURT  
OF APPEALS TO THE NINTH CIRCUIT - 1  
No. 08-01731 RSL

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2 OPENMARKET INC., a Michigan corporation,

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4 Cross-Claimant,

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6 v.

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8 SPRINT SPECTRUM, L.P., a Delaware limited  
9 partnership; and NEXTEL WEST CORP., a  
10 Delaware corporation,

11  
12 Cross-Defendants.  
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15 Notice is hereby given that OpenMarket Inc., Defendant and Cross-Defendant in the  
16 above-captioned action, hereby appeals to the United States Court of Appeals for the Ninth  
17 Circuit from the Order of the United States District Court for the Western District of  
18 Washington, Seattle Division entitled "Order Regarding Retention of Counsel" entered in this  
19 action on January 4, 2010 and attached hereto as Exhibit A.  
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25 DATED this 2nd day of February, 2010.  
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28 By: s/Jeffrey M. Thomas  
29

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 2, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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# EXHIBIT A

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILMA ARMER, *et al.*,

Plaintiffs,

v.

OPENMARKET, INC., *et al.*,

Defendants.

No. C08-1731RSL

ORDER REGARDING RETENTION  
OF COUNSEL

This matter comes before the Court on "Sprint's Motion to Enforce the Court's Order." Dkt. # 79. On October 5, 2009, the Court ordered OpenMarket, Inc., to defend Sprint Spectrum L.P. and Nextel West Corp. against the allegations of the Second Amended Complaint with the clear expectation that OpenMarket would conform its conduct to the order. Dkt. # 76 at 4. Despite the existence of cross-claims between defendants, the open conflict regarding defense obligations under the Messaging Application Services Agreement ("MASA"), and the significant likelihood that defendants' positions on liability and indemnity will be adverse to each other, OpenMarket insists that its counsel can represent both defendants.

OpenMarket's position seems to be that, because the October 5, 2009, Order and the MASA do not explicitly require retention of conflict-free counsel, OpenMarket has no such obligation. There are other rules and codes that govern the conduct of attorneys, however. If, as appears to be the case, Wilmer Cutler and Gordon Tilden cannot think of any reason why the proposed dual representation is unworkable, they should review the Rules of Professional

ORDER REGARDING RETENTION  
OF COUNSEL

1 Conduct, particularly Rule 1.7. OpenMarket has grudgingly accepted the Court's determination  
2 that it must defend Sprint in this litigation and has reserved the right to contest its defense and  
3 indemnity obligations on appeal. Decl. of Frederic R. Klein (Dkt. # 80), Ex. A; Opposition (Dkt.  
4 # 83) at 3 n.1. Thus, if OpenMarket's counsel were to represent both OpenMarket and Sprint,  
5 the litigation strategy that would be most beneficial to OpenMarket (to paint Sprint as the  
6 culpable party should the jury find liability and then disavow its indemnification obligations on  
7 appeal) would be directly adverse to Sprint. In the circumstances presented here, there is an  
8 unwaivable conflict of interest: OpenMarket's counsel cannot, consistent with their professional  
9 obligations, represent Sprint in this matter.<sup>1</sup>

10 For all of the foregoing reasons, Sprint's motion to enforce is GRANTED.  
11 OpenMarket must retain a separate and independent firm to represent Sprint in this matter.  
12 OpenMarket has the choice of retaining Sprint's current counsel or hiring new counsel:  
13 regardless, the retained firm must have the experience and expertise necessary to defend Sprint  
14 in this litigation.

15 Dated this 4th day of January, 2010.

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18 Robert S. Lasnik  
19 United States District Judge  
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22 <sup>1</sup> OpenMarket points out that § 10.3 of the MASA gives OpenMarket the right to settle or  
23 defend with its own counsel. Had OpenMarket acknowledged its defense and indemnification  
24 obligations under the MASA, the risk of conflict would have been substantially reduced such that joint  
25 representation may have been possible (as often occurs when an insurance company handles the defense  
26 for its insured). In the circumstances presented here, however, OpenMarket has not voluntarily agreed  
to defend or indemnify and apparently intends to contest its obligations on appeal. It would be folly for  
Sprint to turn its defense over to attorneys who have an adversary's interests at heart, and it would be  
unethical for the attorneys to accept such representation if offered.